JB Precision Moulding Industries Sdn Bhd (In liquidation) v Sime Diamond Leasing (Malaysia) Sdn Bhd

HIGH COURT (JOHOR BAHRU) — ORIGINATING MOTION NO 17 OF 1993
MOHD GHAZALI JC
5 MARCH 1995

Companies and Corporations — *Winding up — 'Act relating to property' — Company paid security deposit under lease agreement to lessor — Creditors of company later commenced winding-up proceedings against company — Lessor utilized deposit to set off unpaid lease rentals after commencement of winding-up proceedings — Whether it was an act relating to property — Whether act void — Companies Act 1965 ss 223, 233 & 293*

Words and Phrases — *'Act relating to property' — Companies Act 1965 s 293*

Words and Phrases — *'Disposition' — Companies Act 1965 s 223*

On 30 December 1988, a lease agreement ('the agreement') was entered into between the applicant company and the respondent whereby the respondent agreed to lease to the applicant a plastic injection moulding machine. A security deposit and a prepaid rent deposit totaling RM68,458 ('the deposit') was placed with the respondent. A memorandum of deposit which stated that the security deposit was refundable free of interest at the expiry of the agreement and only on complete satisfaction of each and every term and condition was also executed. On 2 December 1989, a winding-up petition was presented against the applicant company. On 27 March 1990, the respondent's solicitors gave notice of termination of the agreement and demanded payment of the unpaid balance of the total lease rentals after deducting the deposit on the ground that the presentation of a winding-up petition constituted a breach of the lease agreement. On 4 April 1989, the applicant company was wound up and a liquidator was appointed. The liquidator demanded the deposit from the respondent but met with no response. The liquidator then applied to court for the return of the deposit on the ground that s 293 of the Companies Act 1965 ('the Act') prohibited the respondent from giving themselves an undue preference over other unsecured creditors. The question to be decided was: (i) whether the transaction was caught by ss 223, 233 and 293 of the Act; and (ii) whether the respondent could set off the deposit from the amount owing by the applicant company to the respondent on the total unpaid lease rentals when the agreement was terminated.

Held, allowing the application:

(1) According to cl 4 of the agreement, the security deposit 'should not be treated as payment of rental' and was to be returned to the applicant company free of interest on the termination of the agreement less such sums as may be due to the respondent. The security deposit was, therefore, merely a security, and when it was paid, the respondent merely had possession but not ownership of the machine. Unless there had been a default under the provisions of the agreement which entitled the respondent to apply the deposit or any part thereof against all moneys, damages and/or arrears of rental as the respondent deemed fit, the property in the deposit remained with the applicant company. Thus, on 30 December 1989, when the winding-up petition was presented against the applicant company, the property in the deposit remained with the applicant company.

(2) The respondent had set off the deposit after the date of the presentation of the petition. Such conduct was void under s 293 of the Act as it amounted to an 'act relating to property' which belonged to the applicant company against whom a winding-up petition had been presented.

(3) The respondent could not be in a better position than other creditors after the presentation of the winding-up petition against the applicant. The respondent was neither a preferred creditor under s 292 of the Act nor a secured creditor as defined in s 2 of the Bankruptcy Act 1967. Under s 233 of the Act, the liquidator was required to take into custody or under his control all the property to which the applicant was or appeared to be entitled, and the respondent could not prevent him from carrying out his duty. Accordingly, the respondent stood in the shoes of a general creditor only.

(4) The word 'disposition' in s 223 of the Act was wide enough to cover the act of setting off by the respondent which took into account the deposit when the lease was terminated on 27 March 1990. That act of taking into account the deposit which was made after the commencement of the winding up of the applicant was a 'disposition' contemplated by s 223 and hence, void.

(5) Section 108(3)(k) of the Act which took effect on 25 September 1993, requiring registration of 'a charge on the credit balance of the company in any deposit account', was not applicable to a transaction prior to that date since that section did not operate retrospectively.

[Bahasa Malaysia summary

Pada 20 Disember 1988, suatu perjanjian pajakan ('perjanjian tersebut') telah dibuat antara syarikat pemohon dengan penentang di

mana penentang bersetuju untuk memajak kepada syarikat pemohon suatu mesin pembuat pemancit acuan plastik. Deposit cagaran dan deposit sewa bayaran terdahulu berjumlah RM68,458 ('deposit tersebut') telah diberikan kepada penentang. Suatu memorandum deposit yang mengatakan bahawa deposit cagaran boleh dikembalikan tanpa faedah pada penamatan perjanjian tersebut jika setiap dan kesemua terma dan syarat telah dipenuhi, telah disempurnakan juga. Pada 2 Disember 1989, suatu petisyen penggulungan telah disampaikan kepada syarikat pemohon. Pada 27 Mac 1990, peguamcara penentang memberikan notis penamatan perjanjian tersebut dan menuntut bayaran baki jumlah sewa pajakan yang belum dibayar selepas menolak deposit, atas alasan bahawa penyampaian petisyen penggulungan itu merupakan suatu kemungkiran perjanjian tersebut. Pada 4 April 1989, syarikat pemohon telah digulung dan seorang penyelesai telah dilantik. Penyelesai menuntut deposit itu daripada penentang, tetapi tidak mendapat sebarang balasan. Penyelesai kemudiannya memohon kepada mahkamah supaya deposit tersebut dikembalikan atas alasan bahawa s 293 Akta Syarikat 1965 ('Akta tersebut') melarang penentang daripada memberikan keutamaan tak wajar kepada diri-sendiri, terhadap pemiutang tak bercagar yang lain. Soalan yang harus diputuskan ialah: (i) sama ada urus niaga yang terlibat itu dirangkumi oleh ss 223, 233 dan 293 Akta tersebut; dan (ii) sama ada penentang boleh menolak deposit daripada jumlah yang dihutang oleh syarikat pemohon kepada penentang, iaitu jumlah sewa pajakan yang belum dibayar, apabila perjanjian tersebut dibatalkan.

Diputuskan, membenarkan permohonan itu:

(1) Mengikut fasal 4 perjanjian tersebut, deposit cagaran 'tidak harus disifatkan sebagai pembayaran sewa', dan mesti dikembalikan kepada syarikat pemohon tanpa faedah atas penamatan perjanjian, selepas menolak apa-apa jumlah yang perlu dibayar kepada penentang. Oleh itu, ia hanya merupakan suatu cagaran, dan apabila ianya dibayar, penentang hanya mempunyai milikan dan bukan pemunyaan terhadap mesin itu. Melainkan jika terdapat suatu keingkaran di bawah peruntukan perjanjian tersebut yang memberikan penentang hak untuk menggunakan cagaran tersebut atau sebarang bahagian daripadanya terhadap kesemua wang, ganti rugi dan/atau tunggakan sewa yang disifatkan sebagai patut oleh penentang, harta cagaran itu adalah bersama syarikat pemohon. Maka, pada 30 Disember 1989, apabila petisyen penggulungan disampaikan kepada syarikat pemohon, harta cagaran adalah bersama dengannya.

(2) Penentang telah menolak deposit tersebut selepas tarikh penyampaian petisyen. Kelakuan sedemikian adalah tak sah di bawah s 293 Akta tersebut, kerana ianya merupakan suatu

'perbuatan yang berkenaan dengan harta' yang dimiliki oleh pemohon yang telah disampaikan dengan petisyen penggulungan.

(3) Penentang tidak boleh berada dalam suatu kedudukan yang lebih baik daripada pemiutang yang lain selepas penyampaian petisyen penggulungan ke atas pemohon. Penentang bukan merupakan pemiutang keutamaan di bawah s 292 Akta tersebut, dan bukannya pemiutang bercagar seperti yang ditakrifkan dalam s 2 Akta Kebankrapan 1967. Di bawah s 233 Akta tersebut, penyelesai dikehendaki menerima ke dalam jagaan atau kuasanya, kesemua harta yang pemohon berhak, atau nampaknya berhak, dan penentang tidak boleh menghalangnya daripada menjalankan kewajipannya. Dengan itu, kedudukan penentang sama dengan pemiutang am sahaja.

(4) Perkataan 'pelupusan' dalam s 223 Akta tersebut adalah cukup luas untuk merangkumi perbuatan tolakan oleh penentang yang mengambil kira deposit tersebut apabila ia menamatkan pajakan pada 27 Mac 1990. Tindakan yang mengambil kira deposit yang telah dibuat selepas permulaan penggulungan syarikat pemohon merupakan suatu 'pelupusan' yang dinyatakan dalam s 223, dan oleh itu, ia adalah tak sah.

(5) Seksyen 108(3)(k) Akta tersebut yang mula berkuatkuasa pada 25 September 1993, yang memerlukan pendaftaran 'gadaian baki kredit syarikat dalam sebarang akaun deposit', tidak terpakai dalam suatu urus niaga sebelum tarikh itu kerana seksyen itu tidak berkuatkuasa secara kebelakangan.]

[*Editorial Note*: The respondent has appealed to the Court of Appeal vide Civil Appeal No J–02–504–95.]

Notes

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

Bah Heng Hong Sdn Bhd v Provisional Liquidator Choong Shin Cheong & Anor [1992] 3 CLJ 1421 (refd)

JB Precision Moulding Industries Sdn Bhd (in liquidation) v Asia Commercial Finance (M) Sdn Bhd [1994] 1 MLJ 734 (folld)

Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (distd)

Legislation referred to

Bankruptcy Act 1967 (Revd 1988) ss 2, 41, 53

Companies Act 1965 ss 108(1), (3)(k), 223, 233, 292, 293

Ong Ban Chai (*Ong Ban Chai & Co*) for the applicant.

Chang Mun Fong and *Low Chi Cheng* (*Lim Kian Leong & Co*) for the respondent. A

Mohd Ghazali JC: The liquidator for the applicant, a company which was wound up on 4 April 1990, is applying for an order that the respondent do pay the applicant company a sum of RM68,458 together with interest at the rate of 8% from 23 April 1990 to the date of realization being security deposit and rent deposit paid by the applicant company on the execution of a lease agreement on 30 December 1988 and costs. B

The background to the application is as follows:

On 30 December 1988, a lease agreement was entered into between the applicant company and the respondent whereby the latter agreed to lease to the former a plastic injection moulding machine complete with accessories for a term of 36 months at the monthly rental of RM3,958. On the execution of the lease agreement, a security deposit of RM64,500 and a prepaid rent deposit of RM3,958 was placed with the respondent (making it a total of RM68,458). C D

A memorandum of deposit was simultaneously executed and it was a term of the memorandum that the security deposit is refundable free of interest at the expiry of the said agreement and only on complete satisfaction of each and every term and condition contained therein.

However, on 2 December 1989, a winding-up petition was presented against the applicant company. E

On 27 March 1990, the respondent's solicitors gave notice of termination of the lease agreement and demanded payment for the sum of RM101,625.54, which is the unpaid balance of the total lease rentals after deducting the security deposit and the prepaid rent deposit on the ground that the presentation of a winding-up petition constituted a breach of the lease agreement. On this aspect, the relevant clause of the said lease agreement reads: F

> 14 Default
>
> 14.1 If during the initial term or any renewed term thereof ... if: G
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> (g) ... on a petition for the bankruptcy dissolution or winding up of the lessee being presented;
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> ...
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> the lessee may, without prejudice to any other rights and remedies the lessor may have under this agreement: H
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> ...
>
> (ii) by written notice to the lessee determine and end this lease and thereupon the lessee shall no longer be in possession of the equipment with the lessor's consent. The lessor may thereafter but shall not be obliged to retake possession of the equipment ...
>
> 14.3 If for any reason whatsoever possession is not obtained by the lessor ... the lessee shall ... pay to the lessor an amount equal to the aggregate of the residual value of the equipment ... plus the unpaid balance of the total lease rentals I

On 4 April 1990, the Johor Bahru High Court ordered that the applicant company be wound up, and that one Ng Pak Yeow be appointed liquidator for the purposes of the winding up. On 23 April 1990, the said liquidator demanded the said security deposit and prepaid rent deposit from the respondent but met with no response. By this application, the liquidator now demands payment of the said sum of RM68,458 on the ground that s 293 of the Companies Act 1965 (hereafter referred to as 'the said Act') prohibits the respondent from giving themselves an undue preference over other unsecured creditors. Section 293 of the said Act reads:

> (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.
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> (2) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be—
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> (a) in the case of a winding up by the Court—
>
> (i) the date of the presentation of the petition; or
>
> (ii) ...

At the hearing of this application, counsel for the applicant submitted that:

(a) The said payment of RM68,458 belongs to the 'estate' of the applicant company which is now represented by the liquidator, and that the respondent is, therefore, not entitled to keep it after the applicant company was wound up.

(b) The said sum represents the assets of the wound-up applicant company, and thus the liquidator must take possession of it under s 233 of the said Act. (Section 233 provides that where a winding-up order has been made the liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears entitled.)

(c) The respondent is not a secured creditor under s 2 of the Bankruptcy Act 1967 and that is not a preferred creditor under s 292 of the said Act. (Section 2 of the Bankruptcy Act 1967 defines a 'secured creditor' as a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.)

(d) The forfeiture by the respondent of the said sum is void against the liquidator and amounted to fraudulent undue preference under ss 223 and 293 of the said Act read together with s 53 of the Bankruptcy Act 1967.

(Section 223 of the said Act provides:

Any disposition of the property of the company including things in action ... made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.)

(Section 53(1) of the Bankruptcy Act 1967 provides:

Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the Official Assignee.)

(e) The memorandum of security deposit was not registered pursuant to s 108 of the said Act and its non-registration renders the transaction void against the liquidator.

(Section 108(1) reads:

Subject to this Division where a charge to which this section applies is created by a company there shall be lodged with the Registrar for registration within thirty days after the creation of the charge statement of the prescribed particulars and—

(a) the instrument (if any) by which the charge is created or evidenced; or

(b) a copy thereof together with an affidavit verifying the execution of the charge and also verifying the copy as being a true copy of the instrument,

and if this section is not complied with in relation to the charge the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.)

(f) Forfeiture of the prepaid rent deposit and the security deposit is void after the presentation of the winding-up petition. In support of this argument, counsel cited the case of *Bah Heng Hong Sdn Bhd v Provisional Liquidator Choong Shin Cheong & Anor* [1992] 3 CLJ 1421. In that case, the facts show that the plaintiffs had rented their premises to a company and had collected a sum of RM100,000 as deposit for the due performance of all the covenants and conditions undertaken by the company while being a tenant of the said premises. The tenancy was prematurely determined and, accordingly, the deposit was forfeited. About three weeks after the said forfeiture, the company was wound up. The liquidator, who was the first defendant, demanded the said sum forfeited by the plaintiffs on the ground that it was payment to a preferred creditor. The court held that the forfeiture of the said deposit had taken place after the winding-up petition was filed and, therefore, such forfeiture is void under s 223 of the said Act.

In reply, counsel for the respondent submitted that the onus on the applicant company is to prove the following:

(a) that the transaction took place within six months prior to the commencement of the winding-up;

(b) that it satisfies the description of one of the types of transaction mentioned in s 53(1) of the Bankruptcy Act;

(c) that it took place at the time when the company was insolvent;

(d) that the person in whose favour the transaction was effected stood in relation of creditor of the company; and

(e) the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding up.

Counsel for the respondent argued that if the applicant company can prove all the elements mentioned above, the payment can be set aside. He submitted that s 293 of the said Act is not applicable, and that by virtue of s 41 of the Bankruptcy Act 1967 the respondent is entitled to a set-off. He contended that the property in the security deposit is a security in a contractual sense, and it does not fall within the contemplation of s 108 of the said Act and, therefore, need not be registered with the registrar of companies. Counsel then argued that it is clear from the terms of the lease agreement, in particular cl 4, that the security deposit is to be a security for the due performance by the applicant company of the terms of the lease agreement, namely:

(a) Clause 4.1 of the lease agreement provides that in the event of the respondent electing to collect a deposit, such deposit shall be retained by the respondent as security for the due observance and performance by the appellant company of the terms and conditions therein and any renewal thereof; the deposit is to be maintained at the same amount during the term of the lease agreement by the respondent and shall not be treated as payment of rental and the same is to be returned to the applicant company free of interest on the termination of the agreement less such sums as may then be due to the respondent under the terms of the lease agreement.

(b) Clause 4.3 further provides that notwithstanding the provisions of cl 4.1, if the applicant company is in default under any of the provisions of the lease agreement then the respondent is entitled at its discretion to apply the deposit or any part thereof against all moneys, damages and/or arrears of rental as the respondent deems fit.

(c) In the memorandum of deposit, the applicant company acknowledged to the respondent that in consideration of the respondent entering into the lease agreement, the applicant company had on the same day deposited with the respondent a sum of RM64,500 as security for the due performance of the terms and conditions contained in the lease agreement. It is further stated that it is only refundable upon the following conditions:

(i) expiry of the lease agreement; and

(ii) only on complete satisfaction of each and every term and condition contained therein. A

Counsel contended that it is clear that the effect of the security deposit is that it shall be security for the due performance by the applicant company of the terms of the lease agreement, and only to be returned on the expiry of the lease and on complete satisfaction of each and every term and B condition contained in the lease agreement. Counsel then referred to the case of *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89, wherein the Privy Council applied the common law rules applicable to a deposit and reiterated the principles laid down in earlier cases that the deposit is not merely a part payment but is also an earnest to bind the bargain so entered C into and created by fear of its forfeiture a notice in the payer to perform the rest of the contract and that a deposit is a guarantee that the contractual relations will be performed.

In that case, one of the questions for determination in the proceedings was whether a vendor was entitled to forfeit a deposit paid on a contract D for the sale of real property, following its non-completion by the purchaser. At p 94, Lord Hailsham LC said:

> As Fry LJ said in *Howe v Smith* at p 101:
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> > 'It (ie the deposit) is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by fear for its E forfeiture a motive in the payer to perform the rest of the contract.'
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> It is worth pointing out that the contract in *Howe v Smith* provided that the sum of £500 there in question was as here paid 'as a deposit and in part payment of the purchase money' and Cotton LJ at p 95 in referring to the judgment of James LJ in *Ex p Barrell*, said: F
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> > 'What is a deposit? The deposit, as I understand ... is a guarantee that the contract shall be performed. If the sale goes on of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on default of the purchaser the contract goes off, that is to say, if he G repudiates the contract, then ... he can have no right to recover the deposit.'

The respondent's counsel argued that when the applicant company allowed itself to be wound up, it lost the right to the security deposit, and when the memorandum of deposit was signed, that was when the disposition as H envisaged by s 223 of the said Act has taken place and thus the respondent is entitled to a set-off.

I agree with counsel for the respondent that this application poses the following questions, namely:

(1) whether the transaction is caught by ss 293, 223 and 233 of the said I Act; and

(2) whether the respondent can set off the security deposit and the prepaid rent deposit from the amount owing by the applicant company to the respondent on the unpaid balance of the total lease rentals when the lease agreement was terminated on 27 March 1990.

In my opinion, a question which need to be answered first is whether the property in the security deposit and the prepaid rent deposit paid by the applicant company on 30 December 1988 has passed to the respondent on that date. According to cl 4 of the lease agreement, which has been referred to earlier, the money paid is a deposit. What is a deposit? According to *Jowitt's Dictionary of English Law* (2nd Ed) Vol 1, a 'deposit' is 'money paid to a person as an earnest or security for the performance of a contract.' With regard to the word 'deposit', *Osborn's Concise Law Dictionary* (7th Ed) states as follows:

> 1 In a contract of sale of land, the deposit is a payment made by way of earnest to bind the bargain. A person who repudiates the contract for good and sufficient reason is entitled to the return of his deposit. If he repudiates it without just and sufficient cause, he forfeits the deposit.
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> 2 A sum payable by a hirer or debtor as a down-payment, eg under a hire-purchase agreement.

Counsel for the respondent has referred to the case of *Linggi Plantations Ltd v Jagatheesan,* wherein it was determined that a vendor is entitled to forfeit a deposit paid on a contract for the sale of real property — the court held that the deposit is not merely a part payment but is also an earnest to bind the bargain so entered into. With respect, I am of the view that the facts in that case are very different from the instant case. That case relates to a sale of real property where it was agreed that the deposit constitutes a part payment. In the instant case, the security deposit and the prepaid rent deposit are securities based upon a lease agreement, namely, a deposit for a lease of machinery. That being so, I am of the view that that case is of no relevance here as the intention of the parties in relation to the payment of the deposit differs from the instant case, namely, it has been specifically agreed to in cl 4 of the lease agreement (referred to earlier) that the security deposit 'shall not be treated as payment of rental'.

The question to be determined now is whether the property in the security deposit and the prepaid rent deposit passed to the respondent on the date of the execution of the lease agreement, that is, 30 December 1988. Counsel for the respondent argued that it has passed to the respondent on that date, but I disagree. Clause 4 of the lease agreement provides the answer, namely, both parties have agreed that the deposit shall not be treated as payment of rental, and that it is to be returned to the applicant company free of interest on the termination of the agreement less such sums as may be due to the respondent. It is merely a security and when it was paid, the respondent merely has possession of it but not ownership. According to *Osborn's Concise Law Dictionary*, a 'security' means 'a possession such that the grantee or holder of the security holds as against

the grantor a right to resort to some property or some fund for the satisfaction of some demand, after whose satisfaction the balance of the property or fund belongs to the grantor.' A

Thus, unless there has been a default under the provisions of the lease agreement which would entitle the respondent to apply the deposit or any part thereof against all moneys, damages and/or arrears of rental as the respondent deems fit, the property in the deposit remains with the applicant company. That being so, I am of the view that on 30 December 1989, that is, the date when the winding-up petition was presented against the appellant, the property in the deposit remains with the applicant company. I would even go further to say that that sum will have to be reflected in the books of the respondent as standing to the credit of the applicant company, and not as an asset of the respondent. B C

The respondent has, however, contended that when the winding-up petition was presented against the applicant company on 30 December 1989, the respondent was entitled to determine and end the lease, which it had done so on 27 March 1990, as cl 14.1(g)(ii) of the lease agreement provides that under such circumstances, it is a breach of the lease agreement. On that date, the respondent's solicitors had given formal notice of the termination of the lease and had also demanded, inter alia, the residual value of the equipment leased plus the unpaid balance of the total lease rentals which amounted to RM101,625.54 after taking into account the said deposits, that is, the security deposit of RM64,500 and the prepaid rent of RM3,958. D E

In the light of the relevant provisions of the said Act and the Bankruptcy Act 1967, referred to above, can the respondent forfeit the said deposit? In other words, the issue is whether the respondent is a 'secured creditor' so that the set-off by them of the security deposit paid under the memorandum of deposit and the prepaid rent deposit do not amount to an undue preferential payment to creditors contemplated by s 293 of the said Act. F

The said s 293, referred to earlier, provides, inter alia, that any act relating to property made against a company shall in the event of the company being wound up be void or voidable; such act amounts to an act of undue preference which is void under the Act under such circumstances. The respondent has set off the security deposit and the prepaid rent deposit after the date of the presentation of the petition. In my opinion, that act would be void as it amounts to an act relating to property which belongs to the applicant company against whom a winding-up petition has been presented. G H

As found earlier, the property in the security deposit and prepaid rent deposit did not pass to the respondent when the lease agreement was made, and that being so, I am of the view that the respondent cannot at all be in a better position than the other creditors after the presentation of the winding-up petition against the applicant company on 2 December 1989. The respondent is definitely not a preferred creditor under s 292 of the I

said Act. Neither is he a 'secured creditor' as defined under s 2 of the Bankruptcy Act 1967, that is, he is not a person holding a mortgage, charge or lien on the security deposit and the prepaid rent deposit. Those deposits may be in the possession of the respondent but the property in it still remains with the applicant company. The liquidator is required under s 233 of the Companies Act to take into custody or under his control all the property to which the applicant company is or appears to be entitled, failing which, he would be committing an offence under the said Act and as such, I am of the view that the respondent, under the circumstances, cannot prevent him from carrying out his duty. In view of this statutory provision, the effect of cl 14.1(g)(ii) of the lease agreement (referred to earlier) is of no consequence and a non-issue.

The respondent has also argued that the disposition of the property in the security deposit and the prepaid rent deposit is not a disposition within the contemplation of s 223 of the said Act, or, in other words, the said s 223 is not applicable in the instant case. He argued that the disposition took place on 30 December 1988, that is, the date when the lease agreement was executed and payment was made, and since the disposition took place outside the six-month period as envisaged by the said s 223 read together with s 53 of the Bankruptcy Act 1967, s 223 is not applicable. The question which has arisen in relation to this argument is, what is a disposition? According to *Jowitt's Dictionary of English Law*, 'the terms "disposition" and "devolution" comprehend and exhaust every mode by which property can pass, whether by act of the parties or by operation of law.' In my opinion the word 'disposition' found in s 223 is wide enough to cover the act of setting-off by the respondent when it took into account the said security deposit and the prepaid rent deposit when it terminated the said lease on 27 March 1990 and demanded for the balance of rental due after taking into account the said deposits. To me, that act of taking into account, which was made after the commencement of the winding-up by the court of the applicant company is a 'disposition' contemplated by s 223 and hence, void.

With regard to the contention by counsel for the applicant company that the memorandum of security deposit renders the transaction void against the liquidator as it was not registered pursuant to s 108 of the said Act, I found that this issue has been adequately dealt with in *JB Precision Moulding Industries Sdn Bhd (In liquidation) v Asia Commercial Finance (M) Sdn Bhd* [1994] 1 MLJ 734, which was cited by both counsel and wherein counsel for the applicant company himself appeared in that case. In that case, the learned judge held that s 108 of the said Act, as it then was, did not apply to a transaction of this nature, namely, prior to 25 September 1993, a charge on the credit balance of a company in any deposit account did not require registration with the registrar of companies and its non-registration was therefore not void against the liquidator of the company. Section 108 was amended by the insertion of a new para (k) to sub-s (3) which took effect on 25 September 1993, and that amendment provides that 'a charge on the credit balance of the company in any deposit

account requires registration with the Registrar of Companies in order not to be void against the liquidator.' I agree entirely with the decision in that case that s 108(3)(k) do not operate retrospectively. Thus, under the circumstances, that amendment is also not applicable to the instant case.

On the whole, I am of the view that the transaction is caught by ss 293, 223 and 233 of the said Act and, hence, the respondent cannot at all set off the security deposit and the prepaid rent deposit from the amount owing by the applicant company to the respondent on the unpaid balance of the total lease rentals when the lease agreement was terminated on 27 March 1990. Since the applicant company is now wound up, the respondent would now stand in the shoes of a general creditor. Thus, I would allow the applicant company's application for an order that the respondent do pay the applicant company the sum of RM68,458 together with interest at the rate of 8% from 23 April 1990 to the date of realization and costs.

Application allowed.

Reported by Angela Ho